Supplementary Material

Chapter 5: The Jacksonian Era—– Criminal Justice/Habeas Corpus and Due Process/The Fugitive Slave Act of 1850

The Constitutional Debate over the Fugitive Slave Act of 1850

The Fugitive Slave Act of 1850 cured what southerners perceived as failings in the Fugitive Slave Act of 1793. Congress authorized federal court judges to appoint federal commissioners. These federal commissioners were empowered to give persons claiming an escaped slave a warrant authorizing them or their deputies to seize the fugitive and return south. Alternatively, if the slaveholder brought the alleged fugitive before the commissioner, the commissioner could issue a certificate authorizing the slaveholder to return home with the fugitive. The fugitive slave was not represented or permitted to testify at either the warrant or certificate hearing. Commissioners were paid $10 whenever they issued a warrant or certificate. They were paid $5 every time they denied a warrant or a certificate. Some northerners in Congress demanded that federal law include the right to a full hearing before the alleged fugitive was taken south. Henry Clay of Kentucky proposed that the fugitive slave act include a right to a hearing in the state in which the seized persons of color was allegedly enslaved. Southerners rejected both provisions. The final bill provided alleged fugitives with no procedural rights. Nevertheless, the Fugitive Slave Act of 1850 passed with the support of Northern Democrats and a few Whigs, such as Daniel Webster, who believed compromise was necessary to preserve the Union (and may not have cared much for free persons of color).

The new fugitive slave law provoked bitter controversy. Southerners and some Democrats were pleased by the provisions that promised substantially increased federal assistance for persons seeking to recover fugitive slaves. President Milliard Fillmore's attorney general, J.J. Crittenden (1787–1863), provided the standard justification for the Fugitive Slave Act of 1850 when he explained that the Constitution vested Congress with complete discretion to determine the appropriate procedures for determining whether a person of color was legally enslaved. Anti-slavery northerners condemned the bill for violating fundamental constitutional rights to due process and habeas corpus. Charles Sumner (1811–1874) offered the conventional constitutional attack on the Fugitive Slave Act of 1850 when he insisted that persons accused of being fugitive slaves had a right to a jury trial before an unbiased decision maker.

Consider when reading these materials whether escaping from slavery is a crime. If not, are persons suspected of being fugitive slaves entitled to due process or habeas corpus? Sumner claimed that popular opinion could prevent the unconstitutional Fugitive Slave Act from being enforced. How did he expect that to happen? Are these tactics constitutionally legitimate?

J.J. Crittenden, "Opinion on the Constitutionality of the Fugitive Slave Bill"[1]

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It is my clear conviction that there is nothing in [the Fugitive Slave Act of 1850] . . . which suspends, or was intended to suspend, the privilege of the writ of *habeas corpus*, or is in any manner in conflict with the constitution.

. . .

The 6th, and most material section [of the Fugitive Slave Act], in substance declares that the claimant of the fugitive slave may arrest and carry him before any one of the officers named and described in the bill; and provides that those officers, and each of them, shall have *judicial* power and jurisdiction to hear, examine, and decide the case in a summary manner—that if, upon such hearing, the claimant, by the requisite proof, shall establish his claim to the satisfaction of the tribunal thus

[1] 5 U.S. Op. Atty. Gen. 254 (1850).

constituted, the said tribunal shall give him a certificate, stating therein the substantial facts of the case, and authorizing him, with such reasonable force as may be necessary, to take and carry said fugitive back to the State or Territory whence he or she may have escaped—and then, in conclusion, proceeds as follows: 'The certificates in this and the first section mentioned, shall be conclusive of the right of the person or persons in whose favor granted to remove such fugitive to the State or Territory from which he escaped, and shall prevent all molestation of such person or persons by any process issued by any court, judge, magistrate, or other person whomsoever.'

There is nothing in all this that does not seem to me to be consistent with the constitution, and necessary, indeed, to redeem the pledge which it contains, that such fugitives 'shall be delivered up on claim' of their owners.

The Supreme Court of the United States has decided that the owner, independent of any aid from State or national legislation, may, in virtue of the constitution, and his own right of property, seize and recapture his fugitive slave in whatsoever State he may find him, and carry him back to the State or Territory from which he escaped. (*Prigg* vs. *Commonwealth of Pennsylvania*). This bill, therefore, confers no right on the owner of the fugitive slave. It only gives him an appointed and peaceable remedy in place of the more exposed and insecure, but not less lawful mode of self redress; and as to the fugitive slave, he has no cause to complain of this bill—it adds no coercion to that which his owner himself might, at his own will, rightfully exercise; and all the proceedings which it institutes are but so much of orderly judicial authority interposed between him and his owner, and consequently of protection to him, and mitigation of the exercise directly by the owner himself of his personal authority. This is the constitutional and legal view of the subject, as sanctioned by the decisions of the Supreme Court, and to that I limit myself.

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Congress, in the case of fugitive slaves, as in all other cases within the scope of its constitutional authority, has the unquestionable right to ordain and prescribe for what causes, to what extent, and in what manner persons may be taken into custody, detained, or imprisoned. . . . It is not within the province or privilege of this great writ to loose those whom the *law* has bound. That would be to put a writ granted by the law in opposition to the law, to make one part of the law destructive of another. This writ follows the *law* and obeys the *law*. It is issued, upon proper complaint, to make inquiry into the causes of commitment or imprisonment, and its sole remedial power and purpose is to deliver the party from 'all manner of *illegal* confinement.' If upon application to the court or judge for this writ, or if, upon its return, it shall appear that the confinement complained of was *lawful*, the writ, in the first instance, would be refused, and in the last, the party would be remanded to his former *lawful* custody.

The whole effect of the law may be thus briefly stated: Congress has constituted a tribunal with exclusive jurisdiction to determine summarily, and without appeal, who are fugitives from service or labor under the 2d section of the 4th article of the constitution, and to whom such service or labor is due. The judgment of every tribunal of exclusive jurisdiction where no appeal lies, is, of necessity, conclusive upon every other tribunal. And, thereof, the judgment of the tribunal created by this act is conclusive upon all tribunals. Wherever this judgment is made to appear it is conclusive of the right of the owner to retain in his custody the fugitive from his service, and to remove him back to the place or State from which he escaped. If it is shown upon the application of the fugitive for a writ of *habeas corpus*, it prevents the issuing of the writ—if, upon the return, it discharges the writ and restores or maintains the custody.

Charles Sumner, "Speech on Our Present Anti-Slavery Duties"[2]

. . . Congress, in disregard of all the cherished safeguards of Freedom, has passed a most cruel, unchristian, devilish law to secure the return into Slavery of those fortunate bondsmen, who have found shelter by our firesides. This is the Fugitive Slaves Bill—a bill which despoils the party claimed as a slave—whether he be in reality a slave or a freeman—of the sacred right of Trial by Jury, and commits the

[2] Charles Sumner, *Speeches and Orations*, vol. 2 (Boston, MA: Ticknor, Reed, and Fields, 1850), 400–409.

question of Human Freedom—the highest question known by the law—to the unaided judgment of a single magistrate, on *ex parte* evidence it may be, by affidavits, without the sanction of cross-examination. Under this detestable, heaven-defying bill, not the slave only, but the colored freeman of the North, may be swept into ruthless captivity; and there is no which citizen, born among us, bred in our schools, partaking in our affairs, voting in our elections, whose Liberty is not assailed also. . . . By unrelenting provisions [the Fugitive Slave Act] visits, with bitter penalties of fine and imprisonment, the faithful men and women, who may render to the fugitive that countenance, succor and shelter, which Christianity expressly requires! Thus, from the beginning to end, it sets at naught the best principles of the Constitution, and the very laws of God.

I might occupy your time by exposing the unconstitutionality of this act. In denying the Trial by Jury, it is three times unconstitutional; first, as the Constitution declares "The right of the people to be secure in their persons against *unreasonable seizures*;" secondly, as it further declares, that "No person shall be deprived of life, *Liberty,* or property *without due process of law*;" and thirdly, because it expressly declares, that "In suits at common law, where the value is controversy shall exceed twenty dollars, *the right of trial by jury shall be preserved*." By this triple cord did the framers of the Constitution secure the Trial by Jury in every question of Human Freedom. That man can be little imbued with the true spirit of American institutions—he can have little sympathy with Bills of Rights—he must be lukewarm for Freedom, who can hesitate to construe the Constitution so as to secure this safeguard.

The act is again unconstitutional in the unprecedented and tyrannical powers which it confers upon Commissions. . . . [A]dding meanness to the violation of the Constitution, the Commission is bribed by a double fee, to pronounce against Freedom. If he dooms a man to slavery, he receives ten dollars; but if he saves him, his fee is five dollars.

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Sir, I will not dishonor this home of the Pilgrims, and of the Revolution, by admitting—nay, *I cannot believe—that this Bill will be executed here.* Individuals among us, as elsewhere, may forget humanity in a fancied loyalty to law; but the public conscience will not allow a man, who has trodden our streets as a freeman, to be dragged away as a slave. By his escape from bondage, he has shown that true manhood, which must grapple to him every honest heart. He may be ignorant, and rude, as he is poor, but he be of true nobility. The Fugitive Slaves of the United States are among the heroes of our age. . . .

There are many who will never shrink at any cost, and, notwithstanding all the atrocious penalties of this Bill, from efforts to save a wondering fellow-man from bondage, they will offer him the shelter of their houses, and, if need be, will protect his liberty by force. But let me be understood; I counsel no violence. There is another power—stronger than any individual arm—which I invoke; I mean the invincible Public Opinion, inspired by the love of God and man, which, without violence or noise, gently as the operations of nature, makes and unmakes laws. Let this opinion be felt in its Christian might, and the Fugitive Slave Bill will become every where upon our soil a dead letter. No lawyer will aid it by counsel; no citizens will become its agent; it will die of inanition—like a spider beneath an exhausted receiver.

. . . [Public opinion] shall prevent any SLAVE-HUNTER from ever setting foot in this Commonwealth. Elsewhere, he may pursue his human prey; he may employ his congenial bloodhounds, and exult in his successful game. But into Massachusetts he must not come. And yet again I say, I counsel no violence. I would not touch his person. Not with whips and thongs would I scourge him from the land. The contempt, the indignation, the abhorrence of the community shall be our weapons of offense. Wherever he moves, he shall find no house to receive him—no table spread to nourish him—no welcome to cheer him. . . .